

SHORELAND ZONING REPORT TO THE 120TH LEGISLATURE

Prepared by the Department of Environmental Protection's
Shoreland Zoning Unit

Introduction

This report is submitted to the Maine Legislature pursuant to Title 38 M.R.S.A. section 449. Section 449 requires the Commissioner of Environmental Protection to biennially report on the implementation and impact of local shoreland zoning ordinances. The report must include:

1. a description of the assistance and supervision that the commissioner has provided to the municipalities in carrying out their shoreland zoning responsibilities;
2. a summary of the shoreland zoning violations investigated by municipal code enforcement officers; and
3. any recommendations for legislation relating to shoreland zoning.

Program Description

The Mandatory Shoreland Zoning Act, commonly referred to as the shoreland zoning law, was implemented in the early 1970's. The Act, as amended, requires all organized municipalities to enact ordinances relating to land use activities in the shoreland zone. The shoreland zone consists of land areas within 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers and tidal waters; within 250 feet, horizontal distance, of the upland edge of freshwater and coastal wetlands; and within 75 feet, horizontal distance, of streams.

The Board of Environmental Protection (BEP) establishes minimum standards for the municipally adopted shoreland ordinances. Those minimum standards are contained in the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances. The Act allows a municipality to enact a different set of standards than those of the Guidelines when it documents to the Commissioner that special local conditions warrant other standards.

The Commissioner of Environmental Protection must approve all shoreland ordinances, and amendments thereto, before they become effective. If a

municipality fails to adopt a suitable shoreland zoning ordinance, the Act requires the BEP to adopt an ordinance for the municipality. The BEP-adopted ordinance is referred to as a *State-imposed ordinance*, and must be administered and enforced by the municipality just as if the municipality had adopted it.

The Department's shoreland zoning program is presently administered by three staff members; two in Augusta and one in the Bangor office. One of the Augusta staff members has recently resigned, leaving a vacancy. The Department plans to move that position to the Southern Maine Regional Office to provide a shoreland zoning program that is more accessible to that region of the state.

The main thrust of the staff of the shoreland zoning unit is that of education and technical assistance. Enforcement efforts are sometimes necessary, but the Department believes that, generally, more is gained through education of town officials and the public than through formal enforcement activities.

Assistance to Municipalities

Municipal assistance makes up the core of the Department's shoreland zoning efforts and is accomplished in numerous ways. The following are some of the activities that were undertaken during the past two-year period to assist municipalities with their shoreland zoning responsibilities.

1. Training. The Department continues to work cooperatively with the State Planning Office's *Code Enforcement Officer (CEO) Certification and Training Program*. The shoreland zoning unit served as faculty for five day-long training sessions for code officers throughout the state. Sessions were held in Blaine, Eddington, Edmunds, Gray and Winthrop. The morning consisted of classroom presentations, followed by field exercises in the afternoon. Approximately 200 code officers attended these sessions. The new alternative to the 30% expansion limitation for nonconforming structures was discussed in detail at each of the sessions.

DEP staff participated in eight (8) other training sessions pertaining to shoreland zoning issues for code enforcement officers. These workshops, organized by the State Planning Office, consisted of four advanced sessions for veteran code officers, and four for beginning code

officers. Five additional sessions relating to wetland issues were held for code officer certification purposes.

In conjunction with the regional planning commissions, DEP's shoreland zoning staff conducted numerous classroom training sessions directed at municipal planning board and appeals board members. Those sessions were also attended by numerous code enforcement officers, who receive certification credits for their participation. Staff traveled to Auburn, Bangor, Bethel, Caribou (3 workshops), Ellsworth, Fairfield (2 workshops), West Bath and Windham to lead these workshops.

Another important component of the Department's training program is realtor training. In the last two years shoreland zoning staff has served as faculty for the University of Southern Maine Center for Real Estate Education's course on Maine's shoreland zoning law. This three hour, for-credit, training program was conducted on six occasions. The Department has developed an informative educational packet for those attending the training. Additional sessions will be held in 2001.

2. Educational Materials. The Department has drafted several educational documents during the past two years. A new leaflet for realtors describing shoreland zoning and the Natural Resources Protection Act has been circulated. Town officials have received six issues of the *Shoreland Zoning Newsletter*, and an updated *Issue Profile* detailing limitations for nonconforming structures is now available. A copy of the most recently issued newsletter is attached to this report.

Thousands of copies of the booklet *Maine Shoreland Zoning – A Handbook for Shoreland Owners* have been distributed to landowners and town officials. The Department has received many positive comments regarding the value of this document to landowners. It is easily read and contains many well-drawn illustrations to supplement the text.

Another notable action of the Department is its establishment of a *shoreland zoning web page*. This page, found at <http://www.state.me.us/dep/blwq/docstand/szpage.htm> includes many of the shoreland zoning unit's educational documents, including the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, all *Issue Profiles* and the *Shoreland Zoning Newsletters*.

3. Shoreland Zoning Filming Project. In the fall of 1999 the Department, working in cooperation with the code enforcement officer for the town of Readfield, filmed the shoreline of that portion of Maranacook Lake that lies within the town of Readfield. The purpose of the project was to determine if it is feasible to document existing shoreline development and vegetation without expending significant monies. Documentation of existing conditions can be crucial toward the establishment of an efficient and effective enforcement program.

Based on the filming efforts, the Department concluded that shoreline filming can serve as a valuable tool for code enforcement. Working with town tax maps, a 14 foot, flat- floored, aluminum boat and motor, and a standard video camera and tripod, the Department was able to provide a good quality film of the shoreline, lot by lot. This documentation of existing conditions will be helpful to the code officer when he or she investigates construction and vegetation removal violations.

The Department presented the details of its filming project in a report made available to local code enforcement officers. The project was also summarized in the Department's shoreland zoning newsletter.

4. Municipal Program Evaluations. In 1999 the Department began "auditing" various municipalities' administration and enforcement of their respective ordinances. Five municipalities were the subjects of the review process in the fall of 1999 and the winter of 2000. Five more are being completed during the winter months of 2001.

The first five towns to be selected were the coastal communities of Biddeford, Bremen, Kittery, Penobscot and Rocque Bluffs. The review consisted of an evening with the chairpersons of the planning board, appeals board, and the selectpersons or councilors. The code officers were also involved in the discussions of how the town administered and enforced their respective ordinances. The second half of the audits consisted of a field review of recently permitted projects.

The Department believes that the audits are valuable to both the municipalities and this agency. Department staff is able to provide advice to the administering officials, while learning first- hand how well the particular town is performing its administrative and enforcement

duties. Some of the more significant deficiencies learned from the visits are as follows.

- a) Town officials tend to forget to forward ordinance amendments to the DEP for approval as required by law.
- b) Along coastal waters, setbacks are not always measured from the upland edge of the wetland (maximum spring tide). Some towns, wrongly, continue to measure setbacks from the mean tidal level.
- c) Some town permit applications do not reference the 30% expansion limitation for nonconforming structures. Thus, applicants may not be aware of the rule before submitting their application.
- d) Some towns do not adequately track permitted expansions of non-conforming structures. This leads to expansions, over time, which do not conform to the 30% expansion limitation.
- e) Few towns require written erosion control plans when significant soil disturbance is proposed.

It is noteworthy that officials from several of the smaller towns expressed frustration over the process by which shoreland zoning is administered. Those officials are unhappy that the State requires the municipal governments to administer and enforce shoreland zoning ordinances, but provides little direct financial assistance to carry-out their duties. One town official noted a case in which the town undertook an enforcement action and was granted a favorable judgement. However, the town did not receive court costs and the amount of the fine did not make up for the costs expended by the town. This matter has left a sour taste in the mouths of that town's officials. Consequently, the town officials have recommended that the state provide a pool of money to assist municipalities with enforcement actions in the shoreland zone.

The municipalities of Ellsworth, Lyman, Machias, Monmouth and Westmanland are the next five municipalities that will be visited as part of the evaluation process.

5. Ordinance Reviews. All newly adopted ordinances and amendments to those ordinances must be approved by the Commissioner of DEP before they become effective. During the past two years the Department has reviewed 148 ordinances and amendments. Two *state-imposed* shoreland zoning ordinances (Harrington and Lovell) were repealed during this time. There are now only 56 fully state-imposed ordinances in place.

The list of municipalities with state-imposed ordinances is found in Appendix A of this report.

6. Miscellaneous Technical Assistance. The greatest amount of staff's time is spent responding, either through site visits, written correspondence, or by telephone, to requests and inquiries from town officials and the public. Hundreds of site visits were conducted, and hundreds of responses to inquiries were written. Phone calls numbered in the thousands.

Evening meetings with local planning boards and boards of appeals are regular events for the shoreland zoning staff, averaging about one per week per staff person.

Other Initiatives and Activities

The shoreland zoning unit has participated in a stakeholders group, commonly referred to as the Beach Task Force. The result of that work group is that several communities are jointly working on "beach management plans" for their respective areas.

Staff have also been active participants in the legislatively required, Department of Conservation led, stakeholders group that is working to create a set of state-wide timber harvesting standards. The shoreland zoning program has a keen interest in the results of that effort. In a separate report, the Department of Conservation will present the results of that group's efforts to the Legislature.

Another initiative of the Department during the past two years sought to reduce the number of municipalities that did not employ certified code enforcement officers. We are pleased that the number of towns that do not have certified code officers has been reduced from 34 to less than 20. The Department will continue its efforts to reduce this number even further.

In 2001 the Department plans to hire an independent contractor to evaluate the effectiveness of the current shoreland zoning program. Although the Department recognizes shoreland zoning administration and enforcement has improved significantly in the past ten years, we remain concerned about its overall effectiveness in meeting the goals and purposes of the law. We believe an independent review of the law and the effectiveness of its

administration, including any recommendations for change, is currently warranted.

Enforcement and Permit Related Activities

1. Reports from Municipal Code Enforcement Officers Relating to Permits. Municipal code enforcement officers are required, on a biennial basis, to report to the Commissioner on their permitting and enforcement activities in the shoreland zone. The Department provides a standard form to the code officers for their use. That form was simplified prior to the most recent reporting period.

The percentage of town code officers who submitted the reports increased from 45% in 1998 to 57% in 2000. Although the rate of return increased by 12% over the previous reporting period, still 43% of the municipal code officers did not return the required reporting information. Appendix B lists the municipalities that filed reports and includes a significant portion of the reported permit and enforcement information.

Like the last reporting period, the percentage of reports indicating that no permitting activities took place over the two-year reporting period is approximately 20%. The Department questions the accuracy of this figure. It seems unlikely that 20% of the municipalities did not have shoreland zoning activities over a two-year period that required local permitting.

The 261 reporting municipalities indicated that 994 new principal structures were built in the shoreland zone. This averages out to 3.8 new structures per municipality, nearly the same as the past reporting period in which the average was 3.6 new structures per town.

Both in the previous reporting period and the current period, the number of expansions of structures is approximately twice the number of new structures. This figure indicates that there is a significant demand for enlargement of structures, many of which are nonconforming and, thus, are subject to the 30% floor area and volume expansion limitation. It is believed that much of the demand for larger structures is fueled by owners' desires to convert traditionally seasonal camps to year-round homes.

Approximately 1250 accessory structures were permitted in the most recent two-year period. 360 permits were issued for piers and docks, of which most were granted in coastal areas.

2. Reports from Code Enforcement Officers Relating to Variances.

Information relating to variances is also required from the code enforcement officer, although the board of appeals is responsible for the granting of variances and administrative appeals. In this 1998-1999 reporting period, 48% of the number of variance applications heard were granted. This figure is up from 38% granted during the previous two years. The Department is discouraged by what may be a trend toward the further relaxation of the requirements for obtaining a variance by the boards of appeals. We believe that the increased percentage of variance applications being approved supports the Department's request of the Legislature (LD 919) to require municipalities to submit variance applications to the Department before acting on them.

3. Reports from Code Enforcement Officers Relating to Enforcement. The 261 reporting code enforcement officers investigated 1267 complaints. Of those complaints, 521 involved activities that were confirmed to be violations of the local shoreland zoning ordinance.

The vast majority of the confirmed violations were settled through informal enforcement action. Only 60 of the violations were resolved through more formal administrative consent agreements, while direct court actions were limited to only fifteen instances. It is clear that informal enforcement action is the preferred choice of the code enforcement officers.

As in past years, the most common types of violations relate to excessive clearing of vegetation, expansions of nonconforming structures beyond the 30% expansion limitation, and new construction within the required setback area.

Regarding violations of the clearing of vegetation standards, the Department has found that few relate to the creation of new cleared openings to the water. Most shorefront property owners now know that they can not create cleared openings in the buffer/setback area. However, there is a tendency for owners to reduce the width of the buffer, and cut more trees than permitted within that remaining buffer. Adjacent to lakes

many violations involve the removal of ground cover and other lower vegetation within the buffer area.

4. Enforcement Action Initiated by the Department of Environmental Protection. The Department has been involved in one formal enforcement action in the past two years. This action is one that was included in the most recent shoreland zoning report to the legislature, and involves the town of Damariscotta and Lake Pemaquid Camping, Inc. The Department, through the Attorney General's Office, filed suit in Kennebec County Superior Court in an effort to require removal of numerous cabins from the shore of Lake Pemaquid. The matter has gone to trial, but the Judge's decision is still pending.

Recommendations and Related Issues

1. Department of Environmental Protection Notification of Variance Applications. The Department remains concerned over a Maine Supreme Judicial Court ruling that the Department has no legal standing to appeal a decision of the local board of appeals if it did not participate in the hearing before the board. The majority of local boards of appeals grant variances more freely than would be permitted if they adhered to the "undue hardship" criteria that must be met to issue a proper variance. The courts have ruled that variances should be the exception rather than the rule. Although the Department has been successful in reducing to percentage of variances granted to less than 50% of those applied for, the number is still too high.

The Department recommends that the Legislature re-enact a repealed provision of the Mandatory Shoreland Zoning Act, requiring local boards of appeals to send copies of variance applications to the Department at least 21 days before the board acts on the variance request. This will enable the Department to respond to the application in writing, or to attend the actual hearing.

The Department believes that the passage of this requested legislation will enable it to reduce the number of improperly granted variances, particularly, those relating to water setback issues. **(Legislative action needed)**

2. Need for Assessment of Effectiveness of the Shoreland Zoning Law. The shoreland zoning law has been in effect for more than 25 years. While it is clear that the law has been beneficial for shoreland areas, including protection of water quality and wildlife habitat and the protection of natural beauty, it is not clear that all municipalities are effectively administering and enforcing their respective ordinances. It is not uncommon for the Department to receive complaints that municipalities are not administering their ordinances properly.

The Department suggests that the time is right for a comprehensive assessment of the implementation of the shoreland zoning program. If an assessment is undertaken, the Department recommends that it be conducted by an independent agency or firm. The assessment should address the Department's effectiveness in oversight of the law, the municipalities' administration of local shoreland zoning ordinances, coordination with the comprehensive planning program, and any recommendations for change in the administration of the law. As noted earlier in this report, the Department plans to move forward with this study if monies are available. **(Legislative action not required. Department is currently seeking grant monies to fund the project)**

3. Review of Town Administration of the Alternative to the 30% Expansion Limitation for Nonconforming Structures. It has been more than two years since municipalities have had the ability to replace the 30% expansion rule for structures that do not meet the water setback requirement, with an alternative provided by the Legislature. The optional alternative limits expansions based on building height and floor area in relationship to the structure's water setback distance. The alternative also allows for greater expansions than normally permitted if certain steps, including buffer plantings, are taken at the time of construction.

Twenty-five municipalities have now adopted the alternative expansion limitation provisions. A review of the administration and enforcement of the alternative limitation for those towns would be appropriate at this time. It is best to determine if the alternative is being properly administered early, rather than after a significant number of projects have been built. **(Legislative action not required)**

4. Monies for Municipal Enforcement Assistance. The shoreland zoning law was adopted to protect the state's water resources, wildlife habitat and the natural beauty of its shoreland areas. The primary burden for administration and enforcement of the law rests with the municipalities. Municipal officials, however, are reluctant to spend monies on enforcement of state-mandated environmental rules. Therefore, enforcement of shoreland zoning ordinances is not a priority for many towns. If the state were to provide monies to assist towns with investigative and legal costs, towns may be more willing to enforce their shoreland zoning ordinances. The recent series of community audits confirmed that there is a demand for such funding. The Department recommends that the Legislature consider establishing a fund that could be tapped by municipal officials for activities pertaining to formal enforcement actions such as attorney fees and court costs. **(Legislative action required)**
5. Amendments to *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*. The Department plans to amend the Guidelines document to establish standards for public trails in the shoreland zone. Numerous communities are now constructing such trails for the public good. However, there are currently no construction standards for such trails, leading to permitting difficulties in some towns.

It is also advisable for the Department to amend its agricultural standards within the shoreland zone, particularly those relating to manure handling. The current standards in the Department's Guidelines are out of date. In fact, the Department of Agriculture has indicated that some of the current standards in the Guidelines may permit levels of manure application that violate that Department's rules. **(Legislative action not required)**